Supreme Court, U.S.
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No. 00-1719

In the Supreme Court of the United States

FRANCISCO VASQUEZ, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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26 pp

QUESTIONS PRESENTED

1. Whether an alien detained by the Immigration and Naturalization Service who seeks to contest the validity of his final removal order by petition for a writ of habeas corpus must name as the respondent to the habeas corpus petition the official having day-to-day control over the facility in which the petitioner is detained and must proceed against that official in a judicial district where personal jurisdiction over that official and venue for an action against that official are proper, or whether the alien may proceed against the Attorney General of the United States as the respondent to the petition.

2. Whether the district court had subject-matter jurisdiction under the federal habeas corpus statute, 28 U.S.C. 2241, to entertain petitioner's challenge to his final removal order.

3. Whether the Board of Immigration Appeals erred in concluding that petitioner is not eligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), because his removal proceeding was commenced after the repeal of Section 1182(c) became effective on April 1, 1997.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	15
Appendix A	1a
Appendix B	3a

TABLE OF AUTHORITIES

Cases:

Ahrens v. *Clark*, 335 U.S. 188 (1948)	11
Billiteri v. *United States Bd. of Parole*, 541 F.2d 938 (2d Cir. 1976)	9
Blango v. *Thornburgh*, 942 F.2d 1487 (10th Cir. 1991)	9
Braden v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973)	4, 8, 11, 12
Brittingham v. *United States*, 982 F.2d 378 (9th (Cir. 1992)	9
Endo, Ex parte, 323 U.S. 283 (1944)	12
Guerra v. *Meese*, 786 F.2d 414 (D.C. Cir. 1986)	9
Henderson v. *INS*, 157 F.3d 106 (2d Cir. 1998), cert. denied, 526 U.S. 1004 (1999)	9
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999)	10
INS v. *St. Cyr*, No. 00-767 (June 25, 2001)	14, 15
Jones v. *Biddle*, 131 F.2d 853 (8th Cir. 1942), cert. denied, 318 U.S. 784 (1943)	9
Mahadeo v. *Reno*, 226 F.3d 3 (1st Cir. 2000), cert. denied, No. 00-962 (June 29, 2001)	14
Sanders v. *Bennett*, 148 F.2d 19 (D.C. Cir. 1945)	9
Yesil v *Reno*, 175 F.3d 287 (2d Cir. 1999)	9
Yi v. *Maugans*, 24 F.3d 500 (3d Cir. 1994)	9

Constitution and statutes: Page

U.S. Const. Amend. VI 10
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(43)(G) (Supp. V 1999) 2
8 U.S.C. 1101(a)(48)(B) (Supp. V 1999) 2
8 U.S.C. 1103(a) (1994 & Supp. V 1999) 10
8 U.S.C. 1182(c) (1994) 2, 3, 4, 13, 15
8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999) 2
8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) 14
8 U.S.C. 1252(b)(2) (Supp. V 1999) 13
28 U.S.C. 2241 13
28 U.S.C. 2243 ..... 4, 7, 8, 9
28 U.S.C. 2255 (1994 & Supp. V 1999) 6, 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 50-65) is reported at 233 F.3d 688. The opinion of the district court (Pet. App. 28-49) is reported at 97 F. Supp. 2d 142.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2000. The petition for a writ of certiorari was filed on March 8, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of the Dominican Republic who was admitted to the United States as a

lawful permanent resident in 1987, and who ultimately established a domicile in Massachusetts. Pet. App. 29, 51. In 1993, petitioner was convicted in Massachusetts state court, after a jury trial, of knowingly receiving stolen property. He was sentenced to a prison term of 18 months, of which he served six months. *Id.* at 29-30, 51; Pet. 4. Under the Immigration and Nationality Act (INA), petitioner's offense was an "aggravated felony." See 8 U.S.C. 1101(a)(43)(G) (Supp. V 1999) (aggravated felony includes "a theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year"); 8 U.S.C. 1101(a)(48)(B) (Supp. V 1999) ("term of imprisonment" includes entire period of imprisonment ordered by court, whether or not defendant serves that entire period).

In February 1999, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner based on his aggravated-felony conviction. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999) (aggravated-felony conviction renders alien deportable). The INS took petitioner into custody and transferred him to a federal detention center in Oakdale, Louisiana. Following a hearing in the Oakdale facility, an Immigration Judge (IJ) found that petitioner was removable based on his aggravated-felony conviction, and ordered him removed to the Dominican Republic. App., *infra*, 1a-2a. Petitioner appealed to the Board of Immigration Appeals (BIA), which affirmed the removal decision. *Id.* at 3a-7a. As pertinent here, the BIA rejected petitioner's contention that he was eligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), on the ground that petitioner's removal proceeding was commenced after April 1, 1997, when the repeal of Section 1182(c) became effective. *Id.* at 6a.

2. On April 4, 2000, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts. His petition named as respondents the Attorney General of the United States, the Commissioner of Immigration and Naturalization, and the Boston District Director of INS, but did not name as a respondent the New Orleans District Director of INS, who manages the Oakdale detention center. See Pet. App. 52 n.1. Petitioner contended that, because his conviction predated the repeal of Section 1182(c), that repeal may not be applied retroactively to his case. In response, the government argued, as relevant here, that the Attorney General, the Commissioner, and the Boston District Director were not proper respondents to the habeas corpus petition, and that any such petition could proceed (if at all) only against the New Orleans District Director, the official with day-to-day control over the facility where petitioner was detained, in a court where personal jurisdiction over that official and venue would be proper. The government also argued that the district court lacked subject-matter jurisdiction over the petition, and that petitioner was statutorily ineligible for discretionary relief from deportation under Section 1182(c), because his 1999 removal proceeding was commenced after the repeal of Section 1182(c) became effective on April 1, 1997.

The district court rejected the government's threshold arguments, ruling that it had subject-matter jurisdiction over petitioner's challenge to his removal order (Pet. App. 32-38), that the Attorney General is the custodian for INS detainees nationwide and thus was a proper respondent to a habeas corpus petition over whom the district court had personal jurisdiction (*id.* at 38-41), and that venue was also proper in the

District of Massachusetts (*id.* at 41-46). The court rejected petitioner's habeas claim on the merits, however. It ruled that petitioner was not eligible for discretionary relief from deportation under Section 1182(c), because the availability of such relief was repealed on April 1, 1997, before the commencement in 1999 of the removal proceeding against petitioner. *Id.* at 46-47.

3. Petitioner appealed. Relying on circuit precedent, the court of appeals rejected the government's argument that the district court lacked subject-matter jurisdiction over petitioner's habeas corpus petition. Pet. App. 53. Nonetheless, the court agreed with the government that "the case cannot proceed due to the petitioner's failure to name his true custodian (the INS district director for Louisiana) as the respondent to his petition." *Ibid.* Accordingly, the court vacated the district court's dismissal of the habeas corpus petition on the merits, and remanded the case for an order dismissing the petition without prejudice or transferring it to the Western District of Louisiana, where petitioner is actually held in custody. *Id.* at 65.

The court first noted (Pet. App. 53) that the habeas corpus statute, 28 U.S.C. 2243, provides that the writ "shall be directed to the person having custody of the person detained." Jurisdiction over the person having actual custody of the petitioner is essential, the court explained, because, as this Court stated in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 494-495 (1973), "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." Although *Braden* provided only "limited guidance for determining the identity of the custodian in any given case," the court noted further that the courts of appeals have generally agreed that "a prisoner's proper custo-

dian for purposes of habeas review is the warden of the facility where he is being held," as the warden "has day-to-day control over the petitioner and is able to produce the latter before the habeas court." Pet. App. 53-54.

The court further observed that, in the context of habeas corpus petitions filed by federal prisoners held under criminal sentences, several courts have rejected the contention that the Attorney General is the prisoner's ultimate custodian and therefore is properly named as a respondent. Pet. App. 54. Those courts have reasoned that, while the Attorney General is "the ultimate overseer of all federal prisoners," he is nonetheless "not responsible for day-to-day prison operations and does not hold prisoners in actual physical custody." *Ibid.* Consequently, the court continued, "a demand to produce the body of the prisoner is more logically directed to the person who does have day-to-day control and actual physical custody, namely, the warden." *Ibid.*

The court then similarly concluded that, in the immigration context, the "person having custody" of a detained alien is normally not the Attorney General, but rather the "official having day-to-day control over the facility where the alien is being detained." Pet. App. 58.[1] The court acknowledged that its ruling might

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[1] The court acknowledged the possibility of "extraordinary circumstances" in which the Attorney General might appropriately be named as the respondent to the habeas corpus petition—for example, if an alien was being held in an undisclosed location, or if the INS was moving an alien from site to site in an effort to manipulate jurisdiction. See Pet. App. 64. Neither the court nor petitioner suggested, however, that this case involves such circumstances. The court also distinguished cases (*id.* at 61-62) in which the detained person challenging his custody filed his habeas corpus petition in the district where he was initially detained, but the

result in habeas corpus petitions being concentrated in a few federal judicial districts where detention facilities are located. *Id.* at 59. The court also noted, however, that a similar concern had arisen in the 1940s, when the number of federal-prisoner habeas corpus petitions rose sharply, and Congress responded by enacting 28 U.S.C. 2255 (1994 & Supp. V 1999), which permits federal prisoners to raise collateral challenges to their convictions in the original sentencing court. Thus, the court noted, "there are better solutions to burgeoning caseloads than rewriting the legal lexicon" concerning who is the custodian of a federal detainee, but such solutions lie with Congress. Pet. App. 59-60. Because the Massachusetts district court lacked personal jurisdiction over the proper respondent, the New Orleans INS District Director who manages the INS detention facility in Louisiana, the court of appeals vacated the district court's decision and remanded for the entry of an order either dismissing the petition without prejudice or transferring it to the Western District of Louisiana. *Id.* at 65.

ARGUMENT

Petitioner urges this Court to grant review to determine whether an alien held in custody by the INS who seeks to challenge, by habeas corpus, the validity of his final removal order must name as the respondent the official having day-to-day control over the facility in which the alien is detained, and consequently whether only a court having personal jurisdiction over that official may adjudicate the claims in the alien's habeas corpus petition. Petitioner argues that the Attorney

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government subsequently moved the prisoner to another location, and the court in which the petition was filed continued to adjudicate the case.

General is a proper respondent to such a habeas corpus petition, and thus the District of Massachusetts was a proper forum for this habeas corpus petition, since (he argues) the Attorney General is subject to the personal jurisdiction of all the federal district courts. See Pet. 5-9. The court of appeals correctly ruled, however, that the INS New Orleans District Director would be the only proper respondent to a habeas corpus petition brought by petitioner, that the Attorney General was not a proper respondent, and that the District of Massachusetts therefore did not have personal jurisdiction over the proper respondent in this case. That decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.[2]

1. The court of appeals correctly concluded that the Attorney General was not a proper respondent to the habeas corpus petition. That conclusion follows from the text of the habeas corpus statute, which provides that "[t]he writ * * * shall be directed to *the person* having custody of the person detained." 28 U.S.C. 2243 (emphasis added). As the court of appeals cogently explained, that statutory language indicates that the proper respondent to a habeas corpus petition is ordinarily the person with day-to-day custody of the individual detained; it does "not indicate that a petitioner may choose from among an array of colorable custodians, and there is nothing about the nature of habeas practice that would justify a court in stretching the statute's singular language." Pet. App. 57. Moreover, the custodian to whom the writ is directed is required by the habeas corpus statute "to produce at

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[2] Similar issues are also presented in the pending petition for a writ of certiorari in *Neufville* v. *Ashcroft*, No. 00-9165.

the hearing the body of the person detained" (28 U.S.C. 2243), and the "individual best able to produce the body of the person detained is that person's immediate custodian" (Pet. App. 58). In short, the "immediate custodian rule effectuates section 2243's plain meaning and gives a natural, commonsense construction to the statute. As an added bonus, the rule is clear and easily administered [and] it affords the courts and the parties a measure of stability and predictability." *Ibid.*

The person with custody over an alien, such as petitioner, held pursuant to a final removal order is ordinarily the INS District Director with immediate responsibility for the alien in detention, not a high-level official such as the Attorney General or the Commissioner of Immigration and Naturalization. Although the Attorney General and the Commissioner are ultimately responsible for the supervision of aliens held in detention, they exercise that responsibility through other officers, such as the District Directors, who are charged with the actual management of the detention of aliens. In addition, bringing an action against a District Director as respondent in a judicial district where that District Director is properly subject to personal jurisdiction advances the efficiency of the habeas corpus proceeding. In this case, for example, petitioner's removal proceeding was held in Louisiana, where he was detained, and so the records of the removal proceeding are in that district. See p. 2, *supra*. And "in many instances the district in which [habeas] petitioners are held will be the most convenient forum for the litigation of their claims." *Braden*, 410 U.S. at 500.

No court of appeals has held, to the contrary, that the Attorney General is ordinarily a proper respondent to a

habeas corpus petition brought by a detained alien.[3] The court of appeals' decision, moreover, is consistent with precedent under Section 2243 in the analogous context of habeas corpus petitions brought by federal prisoners held under criminal sentences. The courts of appeals have uniformly held that a petition for a writ of habeas corpus brought by such a federal prisoner must name the warden or superintendent of the facility in which he is being held as the respondent, and not the Attorney General or some other high-level official or a federal agency. See *Brittingham* v. *United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam); *Blango* v. *Thornburgh*, 942 F.2d 1487, 1491-1492 (10th Cir. 1991) (per curiam); *Guerra* v. *Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986) (per curiam); *Billiteri* v. *United States Bd. of Parole*, 541 F.2d 938, 948 (2d Cir. 1976); *Sanders* v. *Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945); *Jones* v. *Biddle*, 131 F.2d 853, 854 (8th Cir. 1942), cert. denied, 318 U.S. 784 (1943). Those courts have reasoned that, although the Attorney General is ultimately responsible for management of the federal prisons, he does not hold prisoners in actual physical custody, nor is he actually responsible for the day-to-day operations of a

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[3] Only two other courts of appeals have addressed that issue. The Third Circuit has suggested that the Attorney General would not be a proper respondent to such a habeas corpus petition. See *Yi* v. *Maugans*, 24 F.3d 500, 507 (1994). The Second Circuit was presented with that question in *Henderson* v. *INS*, 157 F.3d 106, 122-128 (1998), cert. denied, 526 U.S. 1004 (1999), but ultimately found it unnecessary to resolve the issue because the government withdrew its appeal from the district court decision exercising jurisdiction over a challenge to a deportation order brought by an alien who had named the Attorney General as the respondent to his habeas corpus petition. See *Yesil* v. *Reno*, 175 F.3d 287, 288 (2d Cir. 1999) (per curiam).

particular prison. Pet. App. 54. A demand to produce a federal prisoner is more logically directed to the person who has actual physical custody and day-to-day control, the warden. *Ibid.* And "[s]ince the case law establishes that the warden of the penitentiary—not the Attorney General—is the person who holds a prisoner in custody for habeas purposes, it would be not only illogical but also quixotic to hold that the appropriate respondent in an alien habeas case is someone other than the official having day-to-day control over the facility where the alien is being detained." *Id.* at 57-58.[4]

The court of appeals' decision is also consistent with this Court's decision in *Braden*. In *Braden*, the Court held that a prisoner serving a sentence in an Alabama prison could pursue a petition for a writ of habeas corpus in the United States District Court for the Western District of Kentucky against Kentucky officials to compel those officials to give him the speedy trial required by the Sixth Amendment, even though he was not subject to the territorial jurisdiction of the Kentucky district court. In that case, the Court did not address who should be named as the respondent to such

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[4] Petitioner acknowledges that a federal prisoner's habeas corpus petition must name the warden, not the Attorney General, as the respondent. Pet. 6. Nonetheless, petitioner contends, citing statutes that vest the Attorney General with a special role in immigration matters (*id.* at 7-8), that for habeas purposes, the Attorney General's relationship to an alien is distinguishable from his relationship to a federal prisoner. The court of appeals correctly rejected that contention. Although the Attorney General does have a special role in the construction of immigration statutes, see 8 U.S.C. 1103(a) (1994 & Supp. V 1999); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999), his role with regard to the actual *detention* of aliens is "not materially different" from his role with regard to incarcerated prisoners. See Pet. App. 63.

a habeas corpus petition, and there was no question that relief could be awarded to the petitioner if the Kentucky officials (who were subject to the personal jurisdiction of the Kentucky district court) failed to grant the speedy trial, because those officials could be ordered to dismiss the indictment. See 410 U.S. at 486. The Court also noted that it was more consistent with the purposes of the habeas corpus statute for the matter to proceed in Kentucky, where the pertinent officials and records were located, than in Alabama, which had no connection to the dispute between the petitioner and the Kentucky officials. See *id.* at 494.

In discussing its earlier decision in *Ahrens* v. *Clark*, 335 U.S. 188 (1948), the Court in *Braden* observed that the proper forum for a habeas corpus petition will usually be where the petitioner is actually detained. See 410 U.S. at 495-497. Although the Court disapproved some of its reasoning in *Ahrens*—which had held that 120 aliens held in custody on Ellis Island could not proceed by habeas corpus petition against the Attorney General in the District of Columbia because the aliens were not within the territorial jurisdiction of the District of Columbia district court, see 335 U.S. at 191-193—the Court in *Braden* did not question that *Ahrens* had reached the correct result. Indeed, the Court noted that on the facts of *Ahrens*,

> [the] petitioners could have challenged their detention by bringing an action in the Eastern District of New York [which then had jurisdiction over Ellis Island] against the federal officials who confined them in that district. No reason is apparent why the District of Columbia would have been a more convenient forum, or why the Government should have undertaken the burden of

> transporting 120 detainees to a hearing in the District of Columbia. Under these circumstances, traditional principles of venue would have mandated the bringing of the action in the Eastern District of New York, rather than the District of Columbia.

Braden, 410 U.S. at 500. So too here, the proper forum for petitioner's challenge to his removal order is plainly the Western District of Louisiana, where he is held in detention, and not the District of Massachusetts.

Petitioner's reliance (Pet. 5) on *Ex parte Endo*, 323 U.S. 283 (1944), is likewise misplaced. In that case, this Court held that the United States District Court for this Northern District of California acquired subject-matter jurisdiction over a habeas corpus petition filed by a Japanese-American citizen subject to the evacuation orders of the War Relocation Authority when the habeas corpus petition was filed, and did not thereafter lose jurisdiction when the petitioner was removed to another judicial district. *Id.* at 304-305. The government represented to the Court that if the writ issued and was directed to any official with authority over the petitioner—specifically including an assistant director of the War Relocation Authority who was within the territorial jurisdiction of the California district court—he would be produced and the Court's order complied with in all respects. *Ibid.*

Petitioner also argues (Pet. 8-9) that permitting the Attorney General to be named as a respondent would promote efficiency and prevent forum shopping. That proposition is at a minimum highly debatable. If, as petitioner suggests, the Attorney General would be subject to the personal jurisdiction of every federal district court, then the habeas petitioner would be able to choose the judicial forum with the most favorable

case law (assuming venue requirements were met), rather than the forum most convenient for the litigation of his case. And while it may be true that requiring a habeas corpus petition to be brought in the district where the custodian is located may result in a concentration of habeas corpus petitions in a few judicial districts, that result does not necessarily outweigh the inefficiencies of permitting habeas corpus petitions to be adjudicated far from the district where the petitioner and the officials with actual custody are located. In any event, these considerations are more appropriately directed to legislative consideration. If Congress concludes that the habeas corpus statute as currently in effect results in inefficient adjudication, it can provide a legislative solution, as it did when it enacted 28 U.S.C. 2255 (1994 & Supp. V 1999), providing that federal prisoners may collaterally attack their sentences in the court where the sentence issued, and when it provided that petitions for review of final removal orders must be brought in the court of appeals for the judicial circuit where the immigration judge conducted the removal proceedings, see 8 U.S.C. 1252(b)(2) (Supp. V 1999).

2. Certiorari is also not warranted on the other issues identified in petitioner's "Questions Presented For Review" (Pet. ii). In those questions, which fall into two groups, petitioner argues, first, that the district court properly exercised subject-matter jurisdiction over his habeas corpus jurisdiction under 28 U.S.C. 2241, and second, that the BIA erred in ruling that he is not eligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), because his removal proceeding was commenced after the repeal of Section 1182(c) became effective on April 1, 1997. The first issue is not presented in this case, because the court of appeals held that the district court did have

subject-matter jurisdiction under the habeas corpus statute. See Pet. App. 53. The second issue would arise only if the Court were to hold, contrary to the court of appeals' decision, that the Attorney General was a proper respondent to the habeas corpus petition and that the district court therefore had personal jurisdiction over this case. As discussed above, review of that threshold issue is not warranted.

Nor is a different disposition suggested by this Court's decision in *INS* v. *St. Cyr*, No. 00-767 (June 25, 2001). In *St. Cyr*, the Court held that an alien who is removable because of a conviction for an aggravated felony and who is barred by 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) from raising a purely legal challenge to the validity of his final removal order by petition for review in the court of appeals may pursue that challenge by habeas corpus petition in district court. See *St. Cyr*, slip op. 7-24. Neither lower court in this case held to the contrary, however. Indeed, before this Court's decision in *St. Cyr*, the First Circuit had held, to similar effect, that an alien who is barred from pursuing a purely legal challenge to his final removal order in the court of appeals because of his aggravated-felony conviction could pursue that challenge by habeas corpus petition in the district court. See *Mahadeo* v. *Reno*, 226 F.3d 3, 8 (2000), cert. denied, No. 00-962 (June 29, 2001). The First Circuit then reached the same conclusion in this case, relying on *Mahadeo*. See Pet. App. 53. Thus, the lower courts' resolution of this case did not turn on any misapprehension about the scope of their subject-matter jurisdiction under the habeas corpus statute.

This Court's decision on the merits in *St. Cyr* also does not require any alteration of the lower courts' disposition of this case. Although the district court

ruled against petitioner on the merits, the court of appeals expressly vacated that decision and remanded the case for either a dismissal without prejudice on the merits or a transfer to the proper district court. Thus, the decision does not bar petitioner from pursuing his statutory challenge to his removal order in the proper federal district court. We also note that, unlike the alien in *St. Cyr*, petitioner was convicted of an aggravated-felony offense, not after a guilty plea, but rather after a jury trial. Cf. *St. Cyr*, slip op. 35-36 (ruling that application of repeal of Section 1182(c) to aliens who had pleaded guilty before that repeal's effective date would be contrary to presumption against retroactive application of statutes, because aliens who pleaded guilty "almost certainly relied upon [the significant likelihood of obtaining relief under Section 1182(c)] in deciding whether to forgo their right to a trial").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

DONALD E. KEENER
E. ROY HAWKENS
Attorneys

JULY 2001

APPENDIX A

U. S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Oakdale, Louisiana

File No. A40548483

IN THE MATTER OF
FRANCISCO XAVIER VASQUEZ, RESPONDENT

July 27, 1999

IN REMOVAL PROCEEDINGS

Transcript of Hearing

CHARGE: Section 237 (a) (2) (A) (iii);
Section 237 (a) (2) (B) (i).

APPLICATION:

ON BEHALF OF RESPONDENT:
Mr. Vega

ON BEHALF OFSERVICE:
Mr. Ramirez

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent's name is Francisco Xavier Vasquez is a male, by his own admission, a native and citizen of the Dominican Republic who this Court found to be

removable in proceedings conducted in this Court through the date of September 27, 1999. Based on evidence in the form of his own admissions, testimony of the documents introduced by the INS, which this Court finds to be clear and convincing evidence that the allegations in the Notice to Appear are, in fact, true, and that the Respondent is, therefore, removable as charged. After the finding of removability, the Respondent designated the Dominican Republic as the Country for removal, but does not seek any relief from removability because his attorney says there is no relief available to him.

There being no relief that the Court's aware, nor that the Respondent's attorney is aware of, or that the Government has indicated, it is ordered by the Court that the Respondent be removed from the United States to the Dominican Republic on the charges contained in the Notice to Appear.

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JOHN A. DUCK, SR.
Immigration Judge

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22011

File: A40 548 483 • Oakdale Date: {MAR 6 2000}

In re: FRANCISCO JAVIER VASQUEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
James C. Dragon, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. §1227(a)(2)(A)(iii)] - Convicted of aggravated felony.

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

Lodged: Sec. 237(a)(2)(A)(iiii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

ORDER:

PER CURIAM. In a decision dated September 27, 1999, an Immigration Judge, basing his finding on evidence in the record and on admissions made by the respondent through counsel, found the respondent to be

removable as an alien convicted of an aggravated felony and ordered him removed to the Dominican Republic. The respondent timely appealed. The Immigration and Naturalization Service has opposed the appeal, and adopted the Immigration Judge's decision as their brief. The respondent's appeal is dismissed.

The respondent bases his appeal in large part on alleged ineffective assistance of counsel. We find that the respondent has not met all the procedural requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd.* 857 F.2d 10 (1st Cir. 1988). The respondent's motion was supported by an affidavit from the respondent attesting to the facts relevant to the alleged ineffective assistance of counsel. There is also an indication that the accused counsel was informed of the allegations and allowed the opportunity to respond. However, the respondent has not filed a complaint with the appropriate disciplinary authorities or satisfactorily explained the failure to file such a complaint. The respondent stated that he was more concerned with reopening his immigration proceedings than filing a disciplinary complaint. This excuse does not convince us that the respondent has a legitimate case for ineffective assistance of counsel. If he has a legitimate case, he should file a complaint. Absent such a filing, we are unconvinced that the present appeal is based on a legitimate case of ineffective assistance of counsel.

Litigants are generally bound by the conduct of their attorneys, absent egregious circumstances. *See Matter of Lozada, supra*, at 639 (citing *LeBlanc* v. *INS*, 715 F.2d 685 (1st Cir. 1983)). The respondent wishes not to be bound by concessions made by his counsel (relating to whether or not he wished to request relief from removal; *see* Tr. at 17). Our review of the record does

not lead us to conclude that the respondent has shown egregious circumstances, particularly in light of his failure to file a complaint. There is, in short, insufficient evidence in the record to support the respondent's view of events relating to whether ineffective assistance of counsel occurred. The respondent appears to be using an ineffective assistance of counsel claim to prolong proceedings and to attempt to use a different strategy to obtain relief after an earlier strategy failed. The evidence in the record at this time does not lead us to find that the respondent has a meritorious claim of ineffective assistance of counsel or that we should disregard concessions made through counsel at the hearing below. *See Matter of Lozada, supra,* at 639 (discussing the requirement that disciplinary authorities be notified of breaches of professional conduct as a mechanism to deter meritless claims of ineffective assistance of counsel).

The respondent, on appeal, has also requested a remand for the purposes of exploring his eligibility for relief. The respondent has not shown that the evidence he seeks to present was unavailable and could not have been presented previously. *Cf. INS* v. *Abudu,* 485 U.S. 94 (1988) (discussing motions to reopen based on new evidence). Nothing in the record persuasively establishes a prima facie case for asylum, withholding of removal or protection under the Convention Against Torture. The respondent has submitted newspaper articles indicating that deportees from the United States have committed many crimes in the Dominican Republic and are subject to police surveillance, and are generally considered to be likely criminal suspects. This does not constitute, without more, a claim of persecution or of government-sponsored torture, as the respondent would argue.

The respondent was convicted of an aggravated felony[5] and is not eligible for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), (which does not exist in removal proceedings) or section 240A(a) of the Act, 8 U.S.C. § 1229b(a) (which provides for cancellation of removal for certain permanent residents who meet certain requirements regarding length of time in the United States and who have not committed an aggravated felony).[6] The respondent, as a lawful permanent resident who has been convicted of an aggravated felony since the date of his admission as a lawful permanent resident, is not eligible for relief under section 212(h) of the Act. *See Matter of Yeung*, 21 I&N Dec. 610 (BIA 1997) (specifically holding that an alien who has been admitted to the United States as a

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[5] The respondent argues that he was sentenced to eighteen months imprisonment for theft-related crimes but that the court docket indicates he was only to serve 6 of the 18 months; therefore, he asserts, the conviction record does not support a finding that he was convicted of an aggravated felony. Section 101(a)(48)(B) of the Act, 8 U.S.C. § 1101(a)(48)(B), states that "[a]ny reference to a term of imprisonment with respect to an offense is deemed to include the period of incarceration ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." As the respondent was clearly sentenced to 18 months, his argument that only 6 of the months should be counted is unpersuasive.

[6] The respondent cites non-binding case law from federal district courts in the First and Second Circuits, arguing that he is eligible for section 212(c) relief because at the time of his conviction such relief might have been available to him. *See* Respondent's Br. at 6-7. We note that the respondent has cited no precedent case that stands for the proposition that section 212(c) relief is available in removal proceedings initiated after the repeal of section 212(c) where an individual was found guilty of an aggravated felony after a jury trial.

lawful permanent resident and who has been convicted of an aggravated felony since the date of such admission is ineligible for a waiver under section 212(h) of the Act). In short, there are no compelling or substantial reasons for remanding this case.

The respondent argues that his convictions for distribution of cocaine were vacated. This argument is without any dispositive significance, as the respondent is removable as an aggravated felon based on his theft-related conviction. The respondent conceded this point at the hearing below. *See* Tr. at 5.

For the foregoing reasons, the respondent's appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD